Supreme Court, U. S.
FILED
FEB 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976
No. 76-423

PUYALLUP TRIBE, INC. and RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Respondent,

and

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,
Respondents,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

BRIEF OF AMICI CURIAE ON BEHALF OF PURSE SEINE VESSEL OWNERS ASSOCIATION, PUGET SOUND GILLNETTERS ASSOCIATION, WEST COAST TROLLERS ASSOCIATION AND THE NORTHWEST TROLLERS ASSOCIATION

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I.

INTEREST OF AMICI CURIAE

Amici Curiae represent associations (fishermen associations) of commercial fishermen and fishing vessel owners. Their members fish in Puget Sound, the Strait of Juan de Fuca, and the ocean off the coast of the State of Washington, and they catch the bulk of the commercial salmon taken by non-Indians. Their investment in fishing vessels is estimated at more than $150 million. Purse Seine Vessel Owners Association as well as other commercial and sports fishing associations have tried to intervene in United States v. Washington 384 F. Supp. 312 (W.D. Wash. 1974), (United States v. Washington), but were denied.[1] The fishermen are dismayed by the confusion and conflict caused by the judgment in United States v.

[1]The motions of Purse Seine Vessel Owners Association and Northwest Steelheaders Concil of Trout Unlimited to intervene were denied by the federal District Court on March 22, 1974. The motion of the Washington State Commercial Passenger Fishing Vessel Association to intervene was denied by the federal District Court on July 18, 1974.

Washington--the grant of prerogative rights to fish, for a few favored citizens,[2] and the continuing injunctions and persistent interference by the United States District Court for the Western District of Washington (federal District Court) to usurp the essential power of the State of Washington to regulate its fisheries.[3]

[2]Compare this Court's historic decision in Martin v. Waddell's Lessee, 16 Pet. 367, 10 L. Ed. 997 (1842), that the state's title to the beds of its navigable waters, like that of the English sovereign's, is held as a public trust, subject to a public common of piscary. The federal District Court made no mention of Martin. It is significant that the Indians did not enjoy any such common liberty to fish, before the white men came. See Haeberlin and Gunther, The Indians of Puget Sound 12, IV U. of Wash. Publications in Anthropology, 1930 (Library of Congress Catalog Card No. 30-27636) "Fishing, hunting and berry picking grounds were tribal property. . . . If . . . a tribe used the territory of another tribe without asking permission, the act was regarded as an invasion and war might follow."

[3]Compare, Lawton v. Steele, 152 U.S. 133, 38 L. Ed. 385 (1894) (certain waters closed to fishing), and Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 80 L. Ed. 772, ___ S. Ct. ___ (1936): "The plain purpose of the measure is to conserve for food the fish found within the waters of the state. Over these fish, and over state wild game

We now have conflicting interpretations of the Indian Treaties by the Washington State Supreme Court and the federal District Court. Consequently, this Court's decision in this case will resolve the confusion and conflict that has persisted since the decision in United States v. Washington. Amici support the arguments contained in respondents' briefs and urge this Court to review each of the issues raised by respondents therein, rather than confine itself to the single issue presented by petitioners.

II.

ARGUMENT

A. This Court Can Review Questions Not Raised In The Petition For Certiorari

The petitioners seek review of the single issue of state power to regulate on-reservation fishing. But this Court is not necessarily limited to a

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generally, the state has supreme control. . . . ". . . The provisions of the act assailed are well within the police power of the state, . . ." (426, 80 L. Ed. 775).

review of that issue; it can review the entire decision of the Washington State Supreme Court, if important questions are raised. As the Court said in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 320 n. 6 (1971):

> While this rule [23(1)(c)] reflects many decisions stating that the court is not required to decide questions not raised in a petition for certiorari, it does not limit our power to decide important questions not raised by the parties.

The Court has heretofore decided questions which were not raised in the petition for certiorari. Propper v. Clark, 337 U.S. 472 (1948) and West v. Rutledge Timber Co., 244 U.S. 90 (1916). In Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co., ___ U.S. ___, 97 S. Ct. 582 (1977), this court reviewed and overruled its decision in Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). The Oregon Supreme Court had followed Bonelli in the case below. The parties on appeal did not present, brief or argue the question of the Court's reconsideration of Bonelli. However, amici curiae (twenty-six states) joined in three briefs urging

that the Court reconsider Bonelli. The Court indicated that it was reconsidering Bonelli because the Oregon Supreme Court cited it (97 S. Ct., at 590, n.6) and amici elaborately argued it in their briefs (97 S. Ct. at 586, n.3).

B. The Decision Of The Washington State Supreme Court Presents Important Questions For Review

There are several important questions raised by the decision below which respondents have asked this Court to resolve. One is the allocation of steelhead between Indian and non-Indian fishermen. Amici Indian Tribes argue (Br. pp. 20-25) that this issue was decided by the federal District Court in United States v. Washington and, therefore, res judicata bars its reexamination. The res judicata argument, if applicable, is misplaced. In Department of Game v. Puyallup Tribe, Inc., 414 U.S. 404 (1973) (Puyallup II), this Court remanded the case to the Washington State Supreme Court to determine proper allocation of steelhead between Indian and non-Indian fishermen. That remand occurred before United States v. Washington was even

decided by the federal District Court. If res judicata applied, the federal District Court was bound to follow this Court's and the State Supreme Court's determination on that issue.

This Court in Puyallup II, and the Washington State Supreme Court on remand, addressed the issue of allocation in the context of off-reservation fishing. After this Court's decision in Puyallup II, and before the Washington State Supreme Court's decision below, the court of appeals held that the Puyallup Reservation still existed. United States v. Washington, 496 F.2d 620 (9th Cir. 1974). Amici believe the decision of the court of appeals must be reconciled with the decision of this Court in Puyallup II to determine how the allocation issue applies to on-reservation fishing and how it applies to off-reservation fishing. The federal and state courts are in conflict.

Another important question raised by the decision below which respondents and amici urge this Court to review is whether treaty rights extend to hatchery fish. The state and federal courts are

in direct conflict on this issue.[4] Indeed, in their brief (Br. p. 24) amici Indian Tribes themselves state:

> The initial ruling by the district court that hatchery fish were to be included within the treaty entitlement coupled with its intention to defer implementation of that portion of its ruling as it applied to the Puyallup Tribe and River, has produced a confusing situation, especially in light of the opposite holding by the state courts.

(Emphasis added). This confusion will continue until such time as this Court addresses the issue of whether treaty rights extend to hatchery fish.

Amici Indian Tribes further argue (Br. p. 4) that if this Court considers the hatchery issue as it relates solely to the Puyalup River, such a ruling could have a significant and adverse affect upon the continuing litigation in United States v. Washington. However, this argument overlooks two

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[4]The Washington State Supreme Court, in compliance with this Court's remand, in the case at bench held that treaty rights do not extend to hatchery steelhead (in fact, to all hatchery fish, p. 685). After the State Supreme Court's decision and on August 13, 1976, the federal District Court enjoined the State of Washington from excluding hatchery steelhead from the Indians' treaty share.

basic facts. First, the highest court in the State of Washington has ruled that treaty rights do not extend to hatchery fish. That ruling may only be reversed or modified by this Court. Second, if this Court fails to rule on the hatchery issue, it is certain that the parties to United States v. Washington will appeal any determination of that issue by the federal District Court. In the meantime, several fishing seasons will intervene and the existing confusion and conflict will not lessen.

State hatchery programs are likely to be delayed. Many Washington state legislators are understandably hesitant to appropriate public funds for hatchery programs until the hatchery issue is finally resolved. We, of course, believe that treaty rights should not extend to hatchery fish. Under the current rulings of the federal District Court, 50% of any appropriation of public funds for hatchery programs would be tantamount to a special subsidy for Indians. The treaties were never intended to impose upon the states the burden of subsidizing Indians.

Present consideration of the hatchery issue by this Court would result in substantial savings of time and resources, not only of the parties but of the trial and appellate courts as well.

C. Exceptional Circumstances Necessitate This Court's Review Of The Entire Decision Of The Washington State Supreme Court

Multiple litigation resulting in fragmented management of the salmon and steelhead fisheries has produced general disorder in the fisheries. Review by this Court of the entire decision of the Washington State Supreme Court can restore order to the Pacific Northwest fisheries. Implicit in the court's decision below is the question of who has the authority to manage the steelhead fishery. As the instant case shows, management of the Pacific Northwest fisheries of salmon and steelhead is presently shared by three entities: the federal District Court exercising continuing jurisdiction; the Indian Tribes, including the Puyallup Tribe; and the State of Washington acting through its Departments of Fisheries and Game. The orders and regulations issued by said managing entities

produce constant conflict in the steelhead and salmon fisheries. The federal District Court has ordered the state regulatory agencies to enact regulations which provide Indian fishermen with a larger share of the fisheries.[5] It has also enjoined the state from enforcing regulations which, in its opinion, deprive Indian fishermen of their share of the fisheries, and one injunction even prohibited the enforcement of regulations of an international commission established by a federal treaty between the United States and Canada.[6]

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[5] E.g., on July 16, 1975, the federal District Court issued an injunction requiring the Washington State Department of Fisheries to "promulgate appropriate regulations effective immediately to insure that Indian treaty fishermen may fish with any gear authorized by the State of Washington . . . ."

[6] E.g., although the state was obligated by state law (RCW 75.40.060), by federal statute (16 U.S.C. 776c), and by federal treaty (50 Stat. 1355) to prohibit fishing at certain times in certain waters regulated by the International Pacific Salmon Fisheries Commission, the federal District Court, nevertheless, on August 8, 1975, enjoined the State of Washington from prohibiting fishing by Indians in such waters during such times.

As a result of these orders, fishermen associations have commenced suits in the state courts contending that the Director of the Department of Fisheries has no authority under state law to comply with orders of the federal District Court.[7]

In an attempt to define the authority of the Department of Fisheries and its Director, the state courts have issued orders which conflict with the orders of the federal District Court.[8] The conflicting orders result in inefficient management of the salmon and steelhead fisheries of the Pacific Northwest. If the issues which were before the Washington Supreme Court below are not addressed by

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[7] E.g., Purse Seine Vessel Owners Ass'n, et al. v. Donald W. Moos, et al., Washington State Supreme Court No. 43938, and Puget Sound Gillnetters Ass'n, et al. v. Donald W. Moos, et al., Washington State Supreme Court No. 44401.

[8] E.g., on August 1, 1975, the Superior Court of the State of Washington for Thurston County, Cause No. 52881, entered an injunction which ordered the Director of the Department of Fisheries to suspend his regulation enacted in compliance with the federal District Court's order of July 16, 1975. See Note 5 above.

this Court, attempts to manage the salmon and steelhead fisheries will deteriorate.

Shared management of the salmon and steelhead fisheries has also impeded the orderly collection of data essential to the management and preservation of the entire run or resource.[9]

The Washington State Supreme Court itself looks to this Court for guidance and has said that this Court is the only court which can decide with finality the issues on which the state and federal courts are in conflict. Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 87 Wn.2d 417, 421, 553 P.2d 113 (1976). Further,

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[9] The testimony in the trial court on the size of the Indian catch on the Puyallup River during the 1973-74 season is illustrative of this point. The fish coordinator for the Puyallup Tribe testified that the Indians caught 2,000 to 2,500 steelhead. The biologist testifying on behalf of the tribe indicated that the Indians reported a catch of 1,800 steelhead. The Chairwoman of the tribe stated that the tribal catch was approximately 700. The biologist testifying on behalf of the Department of Game stated that the catch was approximately 3,000 steelhead. (Response to Pet. for Writ of Cert., p. 17).

in its decision below, the Washington State Supreme Court stated:

> The first phase of our opinion is held in abeyance pending a final disposition of the treaty interpretation issue by the United States Supreme Court. . . .

Department of Game v. Puyallup Tribe, Inc., 86 Wn.2d 664, at 688, 548 P.2d 1058 (1976).

The integrity of our federal system is threatened by the orders of the federal District Court in United States v. Washington. Two fishermen associations, Purse Seine Vessel Owners Association and Puget Sound Gillnetters Association, brought an action in a state superior court seeking a determination of the authority under state law of the Director of the state Deparment of Fisheries. The federal District Court entered an order on August 6, 1975, enjoining the state court from proceeding with the action.[10] Washington state

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[10] "3. The Superior Court of the State of Washington for Thurston County is hereby enjoined, pursuant to 28 U.S.C. 2283, from enforcing the injunction referred to in paragraph 2 above [n. 8 above]; and further proceedings in Cause No. 2881 (sic) are hereby stayed pending further order of this Court."

judges face contempt proceedings in the federal District Court if they continue to exercise their jurisdiction. This is an ignominious situation, one which, of itself, is a circumstance so exceptional that this Court should review the entire decision of the court below.

The conflicting decisions of the state and federal courts have produced another undesirable side effect. Washington State commercial fishermen have become politically attuned to the decisions of the state and federal courts in the various cases dealing with the Northwest salmon and steelhead fisheries. They are aware that the State Supreme Court and the federal District Court are at loggerheads over basic issues which vitally affect their interests. They are also aware of the fact that this Court is the only court which can authoritatively settle the issues and restore some semblance of order to the fisheries. These commercial fishermen have felt a deep sense of futility concerning the ability of the state and federal courts to resolve the complex fishery

issues. Consequently, there has been a series of demonstrations with one incident resulting in a near fatal shooting of a fisherman. The State of Washington Fisheries Patrol has been unable to handle the demonstrations and has enlisted the aid of the United States Coast Guard. Amici wish to bring this to the attention of this Court hoping to convince this Court that the existing circumstances surrounding the Pacific Northwest fisheries necessitate a complete review of the decision of the court below.

The survival of the salmon and steelhead runs, the orderly management of salmon and steelhead fisheries, the livelihood of Washington citizens, and the integrity of the federal court system compel a speedy resolution of the issues raised in the court below as set forth in respondents' briefs.

D. Review Of Lower Court's Decision Will Not Be Prejudicial To Any Party

If this Court does review the entire decision of the Washington State Supreme Court, there will be no prejudice to any party before it. The Puyallup Tribe has argued the issues which were before

the court below in Section V of its brief. In addition, 13 of 26 pages of the argument contained in the amici Indian Tribes' brief in support of petitioners are devoted to the questions decided in the court below which were not raised in the petition for certiorari. Furthermore, any decision of this Court, in addition to resolving the conflict presently before it, would provide authoritative guidelines for the resolution of on-going conflicts between the state and federal courts in this and other related Indian fishing cases.

III.

CONCLUSION

We, therefore, respectfully urge this Court to review all the issues raised by the Washington State Supreme Court in its decision below, as those issues are set forth in respondents' briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of February, 1977, three copies of the Brief of Amici Curiae in Support of Respondents were mailed, postage prepaid, to each of the following:

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I further certify that all parties required to be served have been served.

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